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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,187	11/01/2003	John Anthony Guido	UT09042003	3480

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT PAPER NUMBER

1761

DATE MAILED: 09/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

5

<b>Office Action Summary</b>	Application No. 10/699,187	Applicant(s) GUIDO, JOHN ANTHONY	
	Examiner Kelly Mahafkey	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is FINAL.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-19 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>11/1/03</u> . | 6) <input type="checkbox"/> Other: ____.  |

## **DETAILED ACTION**

### ***Drawings***

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they include the following reference character(s) not mentioned in the description: 137 and 139. Corrected drawing sheets in compliance with 37 CFR 1.121(d), or amendment to the specification to add the reference character(s) in the description in compliance with 37 CFR 1.121(b) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-19 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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Claims 1, 8, and 14 recite, "placing said plurality of fresh produce into a *shelf stable processing stream*". The phrase "Shelf stable processing stream" is indefinite. It is unclear if the phrase means that the produce is placed into a stream of fluid or if the produce is introduced into a continuous process. Furthermore, it is unclear if every step in the process must contribute to shelf stability or the only requirement of a "shelf stable processing stream" is that the end product be shelf stable.

Claims 1-4, 6, 8, 9, 11, 14-16, and 18 recite, "fresh produce". The term "fresh" is indefinite. It is unclear as to the conditions required for a product to be fresh. It is unclear how much time must pass between processing phases for a product to be "un-fresh".

Claims 2, 6, 8, 11, 15, and 16 recite, "*undesirable* sections". The term, "undesirable" is indefinite. It is unclear as to how and to whom the product is undesirable.

Claims 2 and 16 are unclear because they recite, "said [removed] one or more undesirable sections". This phrase is unclear because it is unclear as to what "said [removed] one or more undesirable sections" are. It is believed applicant intended to recite, "one or more said undesirable sections".

Claim 4 recites the limitation "wherein determination" in claim 1. There is insufficient antecedent basis for this limitation in the claim.

The term "produce is diverted is based at least in part on one or more visual characteristics" in claims 4 and 8 is a relative term which renders the claim indefinite. The term "in part" is not defined by the claim, the specification does not provide a

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standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to the degree that the visual characteristic is considered.

Claims 4, 8, and 18 are unclear because they recite, "visual characteristics". It is unclear as to the extent that produce characteristics can be visually measured. For example, the specification, page 6 states that "juiciness" is a visual characteristic. If applicant considers "juiciness" a visual characteristic, it is unclear as to what other characteristics the term "visual characteristics" encompasses.

Claims 5, 10, and 19 are unclear because they recite, "visual characteristics includes color, ripeness, size, damage, tenderness, juiciness, or aesthetic appeal". It is unclear as to how juiciness is visually measured. It is further unclear as to how and by whom aesthetic appearance is measured.

Claims 8 and 15 are unclear because they recite, "reintroducing *at least said* removed undesirable sections..." It is unclear as to what this phrase means as it is unclear as to "at least" of what is reintroduced into the system.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 1-6 and 8-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cruess (Commercial Fruit and Vegetable Products, 3<sup>rd</sup> Edition, 1948) in view of Bettencourt et al. (US 3986561).

Cruess teaches a method for processing produce comprising:

- Harvesting a plurality of produce (page 432, Picking, Transporting, and Storing),
- Placing the produce into a continuous series of processing methods (i.e. a processing stream) (Page 432-449),
- Diverting a select portion of produce based on one or more visual characteristics, such as color, ripeness, size, damage, defects, tenderness (Pages 431-436).
- Removing one or more undesirable sections from said diverted select portion of said fresh produce by peeling and coring (Page 436-437)
- Reintroducing at least some of the undesirable sections into the processing stream to produce a product (i.e. Cruess teaches that the core and peels can be further processed to make juices or purees) (Page 437)
- Sterilizing the produce to create a shelf stable product (Page 449),
- Depositing select portion of produce into one or more containers (Page 449).

Cruess teaches that the fresh produce is tomato. Cruess teaches that undesirable sections include a portion of the produce ends (i.e. a core includes both a portion of the top and bottom ends).

Cruess, however, is silent to the harvesting of the produce as machine harvested and to the produce as a sliced product as recited in claims 1 and 8.

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Regarding the harvesting of the produce as machine harvested, Bettencourt teaches of an improved method of harvesting tomatoes. Bettencourt teaches that machine harvesting provides great savings by allowing fewer people to do more work (Column 1 lines 5-44). It would have been obvious to one of ordinary skill in the art at the time the invention was made to use machine harvesting in the harvesting as taught by Cruess in order to take advantage of the savings gained by machine harvesting.

Regarding the produce as a sliced product, Cruess teaches the produce as crushed in order to make a puree. It was known in the art at the time the invention was made to slice tomato products to form diced tomatoes. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include sliced or crushed tomatoes depending on the desired form of the final product.

Claims 7 and 12-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cruess (Commercial Fruit and Vegetable Products, 3<sup>rd</sup> Edition, 1948) in view of Bettencourt et al. (US 3986561), further in view of Floyd et al. (US 5505950).

Cruess teaches a method for processing produce as described above, however, is silent to the produce as placed in a modified atmosphere container as recited in claims 7, 12, and 14 and to the container as including a clear lid or transparent bag as recited in claims 13 and 17.

Floyd teaches of an improved method for packaging perishable foods and horticulture products. Floyd teaches that the method includes a modified atmosphere package. Floyd teaches that a modified atmosphere has the benefits of reduced waste,

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enhanced quality, extended shelf life, and greater consumer convenience. Refer specifically to Abstract and Column 2 lines 20-36. Floyd teaches that the packaging of the foods is clear (Figure 1).

Regarding the produce as placed in a modified atmosphere container, it would have been obvious to one of ordinary skill in the art at the time the invention was made to package the tomatoes products as taught by Cruess in a modified atmospheric package in order to obtain the benefits of a modified atmospheric package, including reduced waste, enhanced quality, extended shelf life, and greater consumer convenience.

Regarding the container as including a clear lid or transparent bag, it was known at the time the invention was made that clear packaging allowed for visual inspection before packaged materials were sold. It would have been obvious to one of ordinary skill in the art at the time the invention was made to package the tomatoes products as taught by Cruess in a package with a clear lid or transparent bag in order to obtain the benefits of a clear lid or transparent bag, such as ease of inspection before placement onto store shelves for sale.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Flyod et al (US 5505950) in view of Bettencourt et al (US 3986561).

Flyod teaches a method for packaging shelf stable tomatoes in a processing stream comprising:

- Harvesting a plurality of tomatoes



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- Sorting or diverting a select portion of tomatoes
- Cutting of the tomatoes
- Depositing tomatoes into one or more modified atmospheric containers.

Refer specifically to Abstract, Column 4 lines 40-47, and Column 7 lines 30-36.

Floyd, however, is silent to the harvesting of the tomatoes as machine harvesting. Bettencourt teaches that machine harvesting provides great savings by allowing fewer people to do more work (Column 1 lines 5-44). It would have been obvious to one of ordinary skill in the art at the time the invention was made to use machine harvesting in the harvesting as taught by Floyd in order to take advantage of the savings gained by machine harvesting.

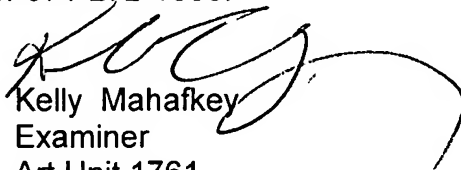
### ***Conclusion***

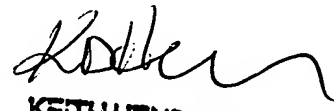
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Kelly Mahafkey  
Examiner  
Art Unit 1761

  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**